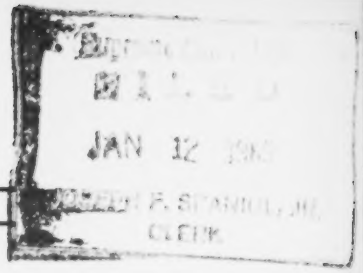

NUMBER: 88-676

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

This Reply Brief responds to the Questions Presented by the Brief of the United States in Opposition.

1. Whether the United States, if a private person, would be liable under Alabama law for wrongfully refusing to do business with petitioner.

2. Whether, in any event, petitioner's claims that federal employees made negligent misrepresentations to a debarring official discriminated against him in awarding contracts are precluded by 28 U.S.C. 2680(h), which prevents recovery for "[a]ny claim arising out of * * * misrepresentation" and "interference with contract rights," or the discretionary function

exception, 28 U.S.C. 2680(a).

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REPLY BRIEF OF PETITIONER

OPINIONS BELOW

The per curiam order of the court of appeals (Pet.App. A1-A2) is reported at 853 F.2d 931. The order of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. The petition for a writ of certiorari was filed on September 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

No provisions additional to those in the Petition for Writ of Certiorari are cited.

STATEMENT

The Statement of the Petition for Writ of Certiorari is adopted herein by reference.

ARGUMENT

Respondent provides no substantive reason why this Court should not consider this case. Respondent cites no

cases indicating Petitioner's argument conflicts with Alabama law.

The thrust of Respondent's argument is that the law is stagnant. Respondent's position, summed up, is: "If a specific rights under specific circumstances have not been asserted or protected in the past, then they should not be in the future."

Respondent's position dictates that every case of first impression must fail for lack of precedence.

Such a stance is repugnant to the enlightened and evolutionary nature of American jurisprudence. It is contrary to landmark cases on desegregation, an accused's right to counsel, cruel and unusual punishment, right to silence, and the like.

It is a stance Petitioner asks this

Court to reject.

1. Respondent argues Petitioner is not entitled to relief as "[T]here is no authority suggesting that, under Alabama law, a private company that refused to do business with a prospective bidder, even if the refusal was the result of negligence or malpractice, would be subject to tort action." (Resp.Brf.Opp. 5).

Respondent's position is contrary to the cases cited by Petitioner on statutory and common law negligence. It is also contrary to Alabama law on negligent violations of Constitutional provisions.

Violations of the Alabama Constitution create a cause of action under the FTCA.

In Alabama, a taking of property

without just compensation is a violation of Article I, Section 23 of the Alabama Constitution and is a tort. Finnell v. Pitts, 132 So. 2 (1930). Damage to property is a taking within the meaning of that section. Id.

In Finnell, state highway officers negligently constructed a highway, thus partially flooding a person's land. The Court held that resulting damage to the property was a taking of property and violated Article I, Section 23, of the Alabama Constitution. The Court held that individual private persons, who were employees of the State of Alabama, were liable in tort for the Constitutional violation even though sovereign immunity barred suit against the State.

Article I, Section 23 of the Alabama Constitution requires just compensation to be paid for damage to or the taking of personal property. Article I, Section 6 of the Alabama Constitution, which guarantees due process and protection of property and liberty interests, subsumes Article I, Section 23 because damage to or taking of property without just compensation is a taking without due process. Engelhardt v. Jenkins, 141 So.2d 193 (Ala. 1962). Thus, in Alabama, a violation of due process rights is tortious conduct. An FTCA cause of action is created when a violation has been made by employees of the United States.

Respondent relies on Art Metal-U.S.A. v. United States, 753 F.2d

1151 (D.C.Cir., 1985) and Cecile Industries, Inc. v. U.S., 611 F.Supp. 97 (3rd Cir. 1986) to claim that "Courts have not been receptive to similar claims under other state laws." (Resp.Brf.Opp. 5, ft.1). Respondent's reliance is misplaced. Respondent does not note that in Art Metal the rights of due process, liberty interests and equal protection were guaranteed by only the United States Constitution; i.e., "Federal Law." In the District of Columbia, unlike Alabama, there is no State Constitution which guarantees those rights. In the District of Columbia, too, there is apparently no tort for a violation of due process rights as is the case in Alabama. See Finnell v. Pitts, supra.

Respondent also does not note that, in Cecile, there was no discussion of whether, under the Pennsylvania Constitution, there were "analogous duties" to those of the Fifth Amendment of the United States Constitution.

Though there may be no recognized cause of action in these jurisdictions for de facto debarment, the same is not true in Alabama. Purely and simply, a de facto debarment or a formal debarment without the requisite safeguards is a deprivation of property and liberty interests without due process of law. Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252, 1259, 1260 (2nd Cir., 1975); Gonzales v. Freeman, 334 F.2d 570, 574, 578, 579 (D.C.Cir. 1964);

See Cibinic and Nash, Formation of Government Contracts, 2nd Ed., 1986, p. 283. As set forth above, in Alabama a violation of one's due process rights as guaranteed by Alabama's Constitution is tortious. Finnell v. Pitts, supra.

2. Respondent further argues the misrepresentation, interference with contractual rights and discretionary function exceptions to the FTCA. Petitioner's Arguments V. and VI. in its Petition for Writ of Certiorari are reiterated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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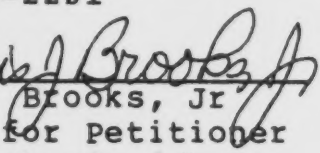

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